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THE PREVENTION OF UNFAIR COMPETITION IN BUSINESS.—THE RECENT OPINION OF CHIEF JUSTICE FULLER.

TWO important events have recently taken place which are, let us hope and believe, significant as indicating a right development of thought in the United States:—

(1) Congress, after a century of inconsistency, has enacted a copyright act, and (2) the Supreme Court of the United States has spoken bravely and wisely on the subject of commercial piracy.

The new copyright act might with propriety have been entitled "An Act for the promotion in the United States of the art of printing and analogous industries." It is baldly unconstitutional in spirit, and it is good to-day only because the things of yesterday were too disreputable to admit of a moment's defence. Our ill-assorted statutes open wide the doors of their privileges to the foreign vagabond who invents an attachment for hand-organs; he may enter at the lowest price, and without let or hindrance. But Bryce with his excellent book, and Herbert Spencer, and Sir John Lubbock, and Professor Huxley, and the rest, to each of whom we owe an inestimable debt, are required to stand and pay the printers and paper-maker's tax, or else deliver without reservation or redress. Certainly the new act is better than the old,—very much better; and for the reason that some evils are very much better than others.

But wholly different is the action of the Supreme Court of the United States upon a cognate subject. The highest function of that exalted tribunal is the wise direction of enlightened thought. If it shall ever lose its capacity to understand, and respond to, and promote the intellectual and ethical progress of the nation, it will fail in its largest duty. If it shall ever finally determine that the United States of the twentieth century is to be held by the duress of the rules and precedents of the England of even the eighteenth century, its judgments will be valueless except as the special verdicts of a learned and upright jury.

In *Lawrence Manufacturing Company v. Tennessee Manufacturing Company*¹ the United States are made to look in the direction of commercial honesty and the position which they ought to occupy in the family of nations and before the world. The court, possibly for the first time, has held up with a strong hand the lamp which Judge Story trimmed a half a century ago,² the light of which may have been obscured, but which cannot be extinguished.

In this important case the Supreme Court for the first time in its history recognizes and explains the fundamental differences between the piracy of a trade-mark and the prevention of unfair competition in business. In *Goodyear Co. v. Goodyear Rubber Company*,³ allusion was made to the existence of a rule whereby "unfair trade" is restrained, but no attempt was made to define it or to interpret the adjudications which illustrate its application and purpose.

The lucid and accurate opinion of Chief Justice Fuller establishes a classification which is obviously logical and obviously useful and of value to the public; and his conclusions are at variance with perhaps not a single well-considered case to be found in the books.

The doctrines affecting the protection of technical trade-marks are easily understood; but the subject of what has come to be known as "unfair competition in business" is much broader and more intricate. Its evolution and development have been characterized by a great deal of artificial reasoning and not a little judicial remark which has been distinctly arbitrary; but the seminal and underlying doctrine which supports the most recent adjudications is really very old. It is the leaven of a number of the opinions of Lord Eldon;⁴ and it was strongly stated and made the basis of decision by Lord Langdale in cases which are still cited as useful precedents.

In *Croft v. Day*,⁵ Lord Langdale said: "No man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really

¹ 138 U. S. 537.

² 3 Story, 458.

³ 128 U. S. 597.

⁴ *Hogg v. Kirby*, 8 Ves. 215; *Cruttwell v. Lye*, 17 id. 335.

⁵ 7 Beav. 84.

selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud.

"The right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others."

After pointing out the similarities between the labels of the parties and the evidence of a purpose on the part of the defendant to mislead the public, his Lordship continues: "My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the name of Day & Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not in fair and honest dealing entitled."

In the old case of *Croft v. Day* we have the same doctrine and rule which is expounded by the Chief Justice of the Supreme Court of the United States at the end of the nineteenth century. The intervening years have evolved little more than a classification of the cases, with the important results which a true classification ensures.

In the Leather Cloth Company's case, decided in 1865,¹ the House of Lords refer with qualified disapproval to *Croft v. Day*. The Lord Chancellor said: "But, although the jurisdiction is now well settled, there is still current in several recent cases language which seems to me to give an inaccurate statement of the true ground on which it rests." He then says, after having referred to the case just mentioned, and others: —

"The true principle, therefore, seems to be, that the jurisdiction of the court in the protection given to trade-marks rests upon property, and that the court interferes by injunction because that is the only mode by which such property can be effectually protected."

If doubts had existed as to there being a right of property in a

¹ 11 H. L. C. 523.

technical trade-mark, they were removed by the Leather Cloth Company's case; and it is equally certain that that case did not destroy or displace the force of Lord Langdale's reasoning as laid down in *Croft v. Day*, except, perhaps, to the extent that it struck out certain loose expressions which were not of the substance of his argument.

Some years later there arose in the House of Lords the case of *Wotherspoon v. Currie*,¹ cited with approval in the opinion before us, in which the doctrine of *Croft v. Day* was in effect approved in a number of opinions of exceptional value.

And at the end of the century we have the opinion of Chief Justice Fuller, and a recognition of the existence of the two kinds of cases: (1) those dependent upon a right of property, and (2) those dependent upon fraud, whereby the earlier cases and the thought and learning of the past are harmonized and made to run hand in hand.

The leading and authoritative adjudications which have been mentioned are supplemented by many others of more or less significance, which have tended in the same direction, and to strengthen and make safe the solutions which have been accomplished.

The precedents cited by Chief Justice Fuller are among the best and most instructive examples which relate to the subject of unfair competition in business. To them might have been added others in which imitations of collocations of words, styles of packages and labels, characteristic signs, ornamentation of coaches, and analogous indicia have been restrained. The cases of this nature may be divided into two classes: (1) those which relate to the use of things which appeal to the eye, and (2) those which relate to the use of words.

Concerning the former, it may be said that it is not clear that the law is not in an unsettled condition, while in respect of the latter class very little remains to be explored.

The cases which relate to unfair competition by means of words, and symbols which are the equivalents of words, are, when understood, harmonious, and to one effect. The rule deducible from them is the rule of *Croft v. Day*, no more, no less; and that rule is this: —

Courts of equity will direct the manner in which words that are

¹ L. R. 5 H. L. 508.

publici juris shall be used, and will prohibit their use in an inequitable manner for the purpose of misleading the public and displacing an existing business.

Beyond this none of the cases go, nor can they be made to go without endangering the doctrine which supports them. Thus, in *Wotherspoon v. Currie*, the wrong-doing consisted not in the use of the word "Glenfield" in the abstract, but in the use of that word in a particular way. It was printed by the defendant in conspicuous type, whereby his starch was offered and sold as "Glenfield Starch;" he did not use the word "Glenfield" to indicate where his article was made, but, in the words of the Court of Appeals of New York, as "a short phrase between buyer and seller," or, in the words of the Supreme Court of the United States, "the phrase" which indicated "the wish to buy, and the power to sell from that origin." He used it in that "secondary sense" which had come to mean the starch of the complainant.

In *Thompson v. Montgomery* the designation "Stone Ale" was used directly as the name of defendant's product. Had it been honestly applied to indicate his place of business, and not as a distinctive name associated by long use with complainant's article, it would not have been within the reasoning of the court.

In the cases relating to the use of proper names the same rule has been applied. There is a concurrence of opinion, many times repeated, that courts of equity will not prohibit a man from using his own name, but will direct how he shall use it, and compel him to use it honestly. The extent to which the defendant will be enjoined must necessarily depend in each instance upon the circumstances of the case.

Even if the word which is protected is, in an accurate sense, a trade-mark and the undisputed property of the plaintiff, there is no rule whereby the defendant may be absolutely prohibited from applying that word to his goods, or from using it in his price-lists and announcements and otherwise in connection with his business.

The defendant has under all circumstances an indisputable right, in every lawful way, to state any fact concerning his article, even if in so doing he uses plaintiff's word-symbol. The only restriction which the law imposes is that he shall not so use it that the manner of its use will tend to give a false name to his article and enable the sale thereof, actually or constructively, as and for the article of the plaintiff. Undoubtedly the courts will jealously

measure the character of the defendant's use of plaintiff's word-symbol; but they have power only to direct and regulate, and not power to prohibit.

"When the common law" (say the Supreme Judicial Court of Massachusetts) "developed the doctrine of trade-marks and trade-names it was not creating a property in advertisements (or in names) more absolute than it would have allowed the author of 'Paradise Lost; ' but the meaning was to prevent one man from palming off his goods as another's, from getting another's business or injuring his reputation by unfair means."¹

The true distinction is nowhere more clearly illustrated than in *Russia Cement Co. v. Le Page*,² which was decided by the same court as the case which has just been cited. The designation at issue was "Le Page's Liquid Glue," which the defendant, Le Page, had made over to the plaintiff, which he had subsequently used in violation of his covenants, and the use of which he sought to justify on the ground that he could not be prevented from making use of his own name. The court said:

"We are of opinion, therefore, that the defendant should be enjoined from using the words 'Le Page's Improved Liquid Glue,' or 'Le Page's Liquid Glue,' to describe the article manufactured by him. . . . In order to avoid misunderstanding, we add that, while the defendant cannot use the words adopted as a trade-name for the article manufactured by him, we do not decide that he may not use the words 'Liquid Glue' or other appropriate words to describe his product, or to state in that connection that he is himself the manufacturer of it."

The distinction here pointed out is not an artificial or unimportant one. The decision is that the name "Le Page" and the term "Liquid Glue" may both be used by the defendant, but not in the form and manner practised by the complainant. There is thus a recognition of the ancient and long-settled rules of the common law, and, at the same time, an efficient application of those which contemplate the prevention of unfair competition.

And it may not be going too far to say that the opinion of Chief Justice Fuller and the precedents which are cited therein weaken, if they do not actually break, the supposed significance of not a few of the earlier cases in which the distinctions now said to be of controlling importance are lost sight of.

¹ *Chadwick v. Covell*, 151 Mass. 190.

² 147 Mass. 206.

It has happened in many instances in which descriptive words have been involved, that, by reason of the character of the pleadings, or because there was no attempt to apply the doctrine of unfair competition, the plaintiff has failed. But the effect of these cases is to establish only that descriptive words are *publici juris*; they do not decide that the manner in which such words are used will not be regulated according to the maxims of equity. There are decisions, perhaps, which justify deliberate fraud; but they are based, in almost every instance, upon an illogical view of the common-law rights of the defendant, and the assumption that the plaintiff was assailing those rights.

Lord Hardwicke, who was, in his day and generation, a useful judge, refused to grant an injunction, saying that he knew of no instance of restraining one trader from making use of the same mark with another.¹ But at a later date Judge Wallace said:—

“*All* practices which tend to engender unfair competition are odious and will be suppressed by injunction.”² The law of the period of Lord Hardwicke is not the law of to-day.

But there is no real conflict between the authorities; there has been merely an evolution of thought whereby we reason with better results and are enabled to understand the old doctrine and more intelligently to apply it.

Perhaps the larger expression is due to looking at the old doctrine under a stronger light and with the aid of the influences of an increasing civilization.

Considered apart from its technical character, the decision of the Supreme Court is of pronounced significance and value, because it is a deliverance in the direction of that which tends to elevate the State as against that which tends to degrade it. It is an announcement, at the opening of the twentieth century, that in the matter of the justification of commercial piracy the United States are breaking away from the narrow application of imperfect reasoning for the sake of the reasoning and its imperfections only.

Rowland Cox.

¹ *Blanchard v. Hill*, 2 Atk. 484.

² 27 Fed. Rep. 22.